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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1734

HARRY KUBO, NISEI FARMERS LEAGUE and
WESTERN TOMATO GROWERS & SHIPPERS, INC.,
Appellants,

vs.

AGRICULTURAL LABOR RELATIONS BOARD OF
THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

APPELLANTS' REPLY TO MOTION TO DISMISS

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1. This is not a zoning case. The access regulation is not a local ordinance adopted by a county or local municipal council (see *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 379, 393 (1926); *State ex rel. Civello v. New Orleans*, 164 La. 282, 283 (1923)) which classifies land use into various distinct categories within a given area. See, *e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Rather, it is a

statewide regulation, adopted by a non-elected administrative agency, which in its breadth substantially affects the fundamental property rights of each and every agricultural employer in the State of California.

This case involves the constitutionality of a regulation which allows an uninvited intrusion or trespass upon the private property of a landowner; it does not involve the constitutionality of "a land use project" (see *Village of Belle Terre v. Boraas, supra,* 416 U.S. at 5), wherein "particular uses to be made [or values] of the land" (*Berman v. Parker,* 348 U.S. 26, 34 (1954)) are affirmatively regulated. Even Appellee recognized this crucial distinction when it stated: "[The access rule] does not affect the use or value of appellants' property. . . ." (Motion to Dismiss, p. 16). Accordingly, the constitutional analysis applied in zoning cases must be found inapplicable to and distinguishable from the issues involved in this case.[1] As noted by Justice Clarke in his dissenting opinion from the lower court's decision, "[T]he law of zoning is not a universal solvent in which property rights are dissolved." 16 Cal.3d at 430. Indeed, the absence of any mention of the law of zoning in *Babcock* or *Central Hardware* adds further support to the view that zoning cases are irrelevant to

[1]A case such as *Village of Belle Terre v. Boraas, supra,* is further distinguishable from the instant case in that the zoning ordinance involved therein was never challenged on Fifth and Fourteenth Amendment fundamental property right grounds. See 416 U.S. at 7. *Village of Belle Terre* thus never reached the issue of whether or not certain rights in property were fundamental; that issue, as discussed *infra,* was explicitly reached in various decisions relating to a landowner's right to exclude uninvited guests from his property.

the present inquiry and that the lower court's and Appellee's reliance on such cases is clearly misplaced.

2. Nor is this a case involving non-fundamental rights such as "non-contractual benefits under a social welfare program" (see *Weinberger v. Salfi,* 422 U.S. 749 (1975); *Fleming v. Nestor,* 363 U.S. 603, 611 (1960)). It is instead a case involving "important liberties cognizable under the Constitution" (see *Weinberger v. Salfi, supra,* 45 L.Ed.2d at 550), liberties which in the context of non-employee access or other uninvited intrusion have always been deemed "fundamental." See *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972); *Central Hardware Company v. NLRB,* 407 U.S. 539 (1972); *Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972).

To assert, as did the lower court and Appellee, that a landowner's right to protect his property from uninvited guests or trespassers is not a fundamental right is to ignore explicit language by this Court. See *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 567-568, 570; *Central Hardware Company v. NLRB, supra,* 407 U.S. at 547; *Lynch v. Household Finance Corp.,* 405 U.S. at 552:

> "We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these *fundamental rights* of a free society are incompatible with each other." *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 570. (Emphasis added.)

In claiming that property rights are not fundamental, both the Appellee and the 4-3 majority of the lower court erroneously failed to distinguish between those *personal* rights in property that are fundamental, and those that are not. As this Court made clear in *Lynch v. Household Finance Corp., supra,* 405 U.S. at 522, the Due Process Clause affords protection against the unwarranted infringement of one's *personal* rights in property. And the personal right in property to protect it from uninvited guests or trespassers has *always* been viewed as a fundamental right and accordingly has only been required to yield upon a showing of necessity:

> "Although . . . the courts properly have shown a special solicitude for guarantees of the First Amendment, *this Court has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." Lloyd Corp. v. Tanner, supra,* 407 U.S. at 567-568. (Emphasis added.)

Accord: *Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).

The recognition of the fundamental nature of this property right was surely the basis for the Court's conclusion in *Babcock* and *Central Hardware* that such Fifth and Fourteenth Amendment rights may yield "only to the extent needed." (351 U.S. at 112). Indeed, contrary to Appellee's assertion, *Babcock* and *Central Hardware* explicitly refer to the Constitution and the Due Process Clause as the basic limitations

against allowing uninvited guests and trespassers upon the property of a landowner. For example, in *Babcock* the Court noted, "organizational rights are granted to workers by the same authority, the National Government, that preserves property rights" (351 U.S. at 112); and in *Central Hardware* the Court stated, "[The Board's argument] would . . . constitute an unwarranted infringement of long-settled rights of property protected by the Fifth and Fourteenth Amendments." (407 U.S. at 547).

Because the personal rights in property involved herein are fundamental rights protected by the Fifth and Fourteenth Amendments' Due Process Clauses, Appellee's and the lower court's reliance on cases such as *Weinberger v. Salfi, supra,* and *Mourning v. Family Publication Service, Inc.,* 411 U.S. 356 (1973) is obviously misplaced.

3. Because this case involves the substantial impairment of well-established and important fundamental rights in property, Appellee's argument relating to its need for administrative ease and efficiency must be rejected.

Appellee contends that an enormously expensive and time-consuming administrative burden would result if the instant access regulation were held unconstitutional. In support of this contention, Appellee refers to two reports written by *Appellee itself* estimating the cost of individual access hearings and that such hearings would be required "in approximately 75% of those cases in which a union seeks to organize." (Motion to Dismiss, Appendix A-1, p. 35).

Such self-serving *estimates* of administrative burden add little to the c nstitutional inquiry at the heart of this case, and noreover, detract from the basic issue facing this Court, i.e., the deprivation of fundamental property rights, a deprivation which thus makes the issue of administrative burden irrelevant. (See, *e.g., Vlandis v. Kline,* 412 U.S. 441, 446 (1973); *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972)).

As previously noted in Appellants' Jurisdictional Statement (p. 13, n. 9), Appellants have not argued that any and all access regulations would necessarily be invalid and that the issue of access must be litigated in each case pursuant to the ALRA's unfair labor practice procedures. Rather, Appellants have pointed out that an access regulation can be devised which would meet all constitutional requirements as long as it sets forth understandable criteria and takes into account the constitutional standards and limitations of *Babcock* and its progeny. With the promulgation of such a regulation, most employers would necessarily be deterred from litigating access issues unless they were reasonably certain of success. As noted by Appellee (see Motion to Dismiss, p. 21), *assuming the Board followed appropriate constitutional standards,* many employers would ultimately be required to allow non-employee access to their farms,[2]

[2]This is not to say that other employers would not be required to yield their property rights to non-employee access. Appellee's assertion that Appellants' claims of alternative means of communication are "unsupported or flatly contradicted" (see Motion to Dismiss, p. 17, n. 6) is thus confusing and frivolous, inasmuch as both the California Supreme Court and Appellee have admitted that as a result of the instant access regulation, there will be a number of farms at which access is not necessary

a fact which strongly supports the view that many employers would not engage in unnecessary access litigation and which further suggests that Appellee's estimate of litigation in 75% of all cases is unrealistic and based on nothing other that unsubstantiated speculation.[3] In this connection, it is noteworthy that in the forty-year history of the NLRA, there have been less than one hundred cases litigated involving the issue of access even though the NLRB has adhered to a strict case by case approach.

However, even assuming an added administrative burden would result from a finding of unconstitution-

in order to communicate effectively with employees. (See, 16 Cal.3d at 410). As noted in Appellants' "Application For Stay Of The Judgment And Orders Of The Supreme Court Of The State Of California" (p. 6, n. 2), both the declarations of Appellant Harry Kubo and the verified Return submitted to the California Supreme Court were at no time contradicted by Appellee.

[3]Appellee's further argument that the seven-day election procedure and the short peak season requirements of the ALRA demand an overbroad regulation ignores the realities that even before the access regulation was in effect, unions representing agricultural employees had little or no difficulty obtaining sufficient signatures for election petitions or winning most elections. For example, according to the Appellee's Public Information Office, as of September 12, 1975, approximately one week prior to the California Supreme Court's stay of the lower courts' orders enjoining the access rule, 171 petitions for elections covering thousands of agricultural employers had been filed, and by November 13, 1975, election results were as follows: employees of 259 farms voted for either the UFW or Teamster Unions while employees of only 13 farms voted no-union. The Court is requested to take judicial notice of these facts. Moreover, as indicated by the authorities cited above, Appellee cannot rely on its own administrative procedures to justify an unconstitutional infringement of fundamental rights in property. Such a bootstrap argument has no place in the constitutional analysis required herein, especially when formal or informal administrative procedures can be devised by Appellee itself to allow for a pre-election and/or post-election access inquiry which could easily satisfy the time restrictions provided in the ALRA.

ality, the state's interest in administrative efficiency cannot be deemed a sufficient basis for depriving citizens of their fundamental rights. *Stanley v. Illinois, supra,* 405 U.S. at 656-657. This Court has forthrightly rejected similar state contentions in the past and should again reject such a contention in this case, a contention which impermissibly elevates the value of administrative speed and efficiency above the value of Appellants' fundamental rights as guaranteed by the Constitution. See *Cleveland Board of Ed. v. LaFleur,* 414 U.S. 632, 644, 649 (1974); *Vlandis v. Kline, supra,* 412 U.S. at 446; *Stanley v. Illinois, supra,* 405 U.S. at 656-657. As this Court stated in *Stanley v. Illinois:*

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. [Footnote omitted] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determinations . . ." 405 U.S. at 656, 657.

CONCLUSION

For the reasons stated herein, as well as for the reasons stated in its Jurisdictional Statement, Appellants respectfully submit that the decision below should be summarily reversed, and that if this Court is not disposed to reverse summarily, it is respectfully urged, in light of the substantial federal questions involved, that probable jurisdiction be noted.

Dated, September 1, 1976.

Respectfully submitted,

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